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80-1518
No.

IN THE

Supreme Court of the United States

October Term, 1980

NORMAN DAVIS, on behalf of his infant son, JAMES DAVIS,

Petitioner,

v.

MAINE-ENDWELL CENTRAL SCHOOL DISTRICT, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED.

1. Does petitioner have a private cause of action under the Rehabilitation Act of 1973 where there is a difference of opinion regarding the kind of educational services to be provided to a handicapped student and where he has brought the same action under the Education for All Handicapped Act?

2. If petitioner does have a private cause of action, does the Court have jurisdiction in regard to complaints concerning appropriate educational services for the student if federal and state laws and regulations provide detailed procedural safeguards and administrative remedies in regard to complaints involving appropriate public educational services for a handicapped student, and if those procedural safeguards and admin-

istrative remedies are not exhausted or even pursued by the handicapped student or his parents?

3. If it is found that the Court has jurisdiction to hear such complaints, does the Court have the authority to order a public school to provide the specific educational services sought for the student in this case, as well as the authority to order the payment of compensatory damages as requested?

PARTIES TO THE PROCEEDING.

In the District Court below, Norman Davis, on behalf of his infant son James, as Plaintiff, brought suit against:

Maine Endwell Central School District;

Lawrence Rice, in his official capacity as President of the Board of Educa-

tion for Maine Endwell Central School District;

William O'Connor, in his official capacity as Superintendent of Schools for the Maine Endwell Central School District;

John Oakes, in his official capacity as Chairman of the Committee of the Handicapped.

The real party in interest in the case is the Maine Endwell Central School District.

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RESPONDENTS' BRIEF IN OPPOSITION.

REASONS FOR DENYING WRIT.

POINT I.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

It is difficult to understand petitioner's reasoning that the Second Circuit's decision in this case is in conflict with other Circuit Court decisions. This case involves a difference of opinion between petitioner and respondents regarding the kind of educational services which a student in an elementary public school should receive. The student has not been excluded from school because of his handicapping condition or otherwise. The cases cited by petitioner do not involve such a situation, and they do not involve the Education for All Handicapped Act (20 U.S.C. Section 1401, *et seq*, hereinafter "EHA") which was the

basis for the Second Circuit's decision in this case.

Petitioner refers to *Camenisch v. University of Texas*, 616 F. 2d 127 (5th Cir.). In *Camenisch*, however, exhaustion of administrative remedies under Section 504 of the Rehabilitation Act (29 U.S.C. Section 794) was not required because the Court found the arguments "persuasive as to why an appropriate exhaustion requirement would have to be waived in this case." The arguments in *Camenisch*, included the inadequacy of the administrative procedure. In this case, the District Court well noted the substantial and detailed administrative procedural safeguards applicable to petitioner, and petitioner could offer no reason to the District Court nor to the Circuit Court to waive the exhaustion requirement.

On a writ of certiorari, this Court on April 29, 1981 vacated and remanded the Circuit Court decision in *Camenisch*, 49 U.S.L.W. 4468. The Court did not consider the Section 504 issue nor the question of exhaustion of administrative remedies under Section 504. Thus, *Camenisch* does not support petitioner's position in this case, nor does *Kling v. County of Los Angeles*, 633 F. 2d 876 (9th Cir. 1980).

The Court in *Kling*, after citing this Court's decision in *Cannon v. University of Chicago*, 441 U. S. 677, found that the administrative procedures under Section 504 were inadequate and accordingly that exhaustion was not required. *Cannon* involved a Title IX case, and had not been brought under the EHA as has this case nor did it involve the

extensive procedural safeguards and administrative remedies thereunder. *Cannon*, *Kling*, and *Camenisch* are all inapplicable to this case.

POINT II.

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner claims that in the two decisions by this court addressing Section 504, exhaustion was not required. *Southeastern Community College v. Davis*, 442 U. S. 397; and *Campbell v. Kruse*, 434 U. S. 808.

This Court in Davis did not address the issue of exhaustion under Section 504. Further, *Campbell*, although involving Section 504, was a class action over 36,000 handicapped children and involved standards for tuition reimbursement. *Campbell* did not involve a dispute regarding the kind of educational

services to be provided to one handicapped student as does this case.

Campbell is illustrative of other cases cited by petitioner which involve causes of action for the benefit of classes under the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. *NAACP v. Medical Center, Inc.*, 599 F. 2d 1247 (3rd Cir. 1979), *NYSARC v. Carey*, 446 F. Supp. 479, 485-86, aff'd 612 F. 2d 644 (2d Cir. 1979). These cases are not applicable in this matter.

POINT III.

CONGRESS AND NEW YORK STATE HAVE PROVIDED DETAILED AND EXTENSIVE ADMINISTRATIVE REMEDIES WHICH PETITIONER SEEKS TO TOTALLY SIDESTEP.

As the complaint states and as the District Court found (Petition for Certiorari, B23-B29), educational services

were at all times provided to the student. Contrary to the statement in petitioners' brief (page 4), the student has not been excluded from respondents' elementary school. This dispute arose not because the student was excluded from school, but because petitioner did not believe that the educational services which were provided to the student were appropriate. In his complaint, petitioner seeks "a permanent injunction ordering the defendants to provide * * * an individualized educational program for the student." By making a conclusory statement that the Rehabilitation Act was violated, petitioner is trying to "bootstrap" himself into Court and seeking to totally sidestep the administrative remedies established for such matters.

The EHA was passed by Congress to prevent the erroneous classification of handicapped children and to insure that appropriate educational services were provided. S. Rept. 94-168, 94 Cong. at 26-28. Substantial and extensive impartial administrative remedies were contemplated and implemented. Legislative History, H. R. 7217 (H7149, H7764); Sen. Conf. Debate (S20429, S20433). The Fleischman Report cited by petitioner predates the passage of the EHA.

The EHA sets forth substantial and detailed procedural safeguards to insure that handicapped students are properly identified and classified, and that they receive appropriate educational services. Subsequent judicial review is included. 20 U.S.C. Section 1415. New York State provides for the education of children

with handicapping conditions, and sets forth extensive impartial procedural safeguards for such matters and in accordance with the federal law and regulations. New York State Education Law, Sections 4401-09; Regulations of the Commissioner of Education, 8 N.Y.C.R.R. Section 200.01 *et seq.*

The District Court noted well that the exhaustion requirements in the EHA:

> "* * * represent Congressional recognition of the view expressed by the Supreme Court in another school context that these educational questions lie in an area in which the courts' 'lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels'. *San Antonio School District v. Rodriguez*, 411 U. S. 1, 43, 93 S. Ct. 1278 * * *, *Harris v. Campbell*, 472 F. Supp. 51 at 55 (E.D. Vir. 1979)" (Petition, B39).

The purpose of exhausting administrative remedies is to give the agency involved "an opportunity to develop factual findings, to apply its expertise to new issues and to exercise its discretionary powers". *Touche Ross & Co. v. Securities & Exch. Com'n*, 609 F. 2d 570 (2d Cir. 1979); *McKart v. United States*, 395 U. S. 185, 193-94, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969):

> "* * * there are many other significant provisions in S. 6. I am particularly pleased with the specific guarantees of due process of law provided for handicapped children and their parents in all matters relevant to identification, evaluation, and placement * * *" S. 6 Debate, June 18, 1975, Congressional Record-Senate, S10981.

Petitioner is attempting to avoid all of the extensive procedural safeguards and administrative remedies established by Congress and the State for

disputes such as is involved herein.

POINT IV.

PETITIONER DOES NOT HAVE A PRIVATE CAUSE OF ACTION UNDER THE REHABILITATION ACT.

The purpose of the Rehabilitation Act of 1973 was to "expand employment opportunities in the public and private sectors for handicapped individuals." 29 U.S.C. Section 701(8); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F. 2d 672, 679 ftnte. 11 (8th Cir. 1980). Petitioner's complaint does not allege any discrimination regarding employment, nor can it. Accordingly, no private case of action exists under the Rehabilitation Act in this case. *United States of America v. Cabrini Medical Center*, Docket No. 80-6166, decided January 27, 1981 (2nd Cir.); *Pennhurst State Hospital*

v. Halderman U. S.

(1981); *Southeastern Community College v. Davis*, 442 U. S. 397, 410 (1979); *Trageser v. Libbie Rehab. Center, Inc.*, 590 F. 2d 87 (4th Cir. 1978):

> "* * * [W]e can find no extrinsic evidence of congressional intent, contemporaneous with passage of the section, to create a private remedy nor have we discovered any subsequent persuasive indication that it has ever been the intent of the Congress to create a private judicial remedy. Neither do we believe that implication is essential to achieving the objectives of the statute* * * Our task here is to carry out the intent of Congress not to substitute our judgment as to appropriate remedies* * *" *Simpson v. Reynold Metals Co., Inc.*, 629 F. 2d 1226, 1244 (7th Cir. 1980).

POINT V.

EVEN ASSUMING THAT THE REHABILITATION ACT APPLIED, THE REGULATIONS THEREUNDER WOULD REQUIRE EXHAUSTION AS WELL.

The regulations to the Rehabilitation Act make the Act applicable to preschool, elementary and secondary education. 34 C.F.R. Reg. 104 31. The regulations also require that procedural safeguards be established to enable parents to influence decisions regarding the evaluation and placement of their children. 34 C.F.R. Reg. 104.36. "Compliance with the procedural safeguards of Section 615 of the Education of the Handicapped Act is one means of meeting the requirement." 34 C.F.R. Reg. 104-36.

In the EHA, Congress provided for extensive procedural guarantees, including the right to notice and a hearing on

any matter affecting a handicapped child's educational program. 20 U.S.C. Section 1415. Pursuant to 20 U.S.C. Section 1415(b)(1)(C), New York State has developed and implemented substantial procedural safeguards and impartial administrative remedies. *North v. District of Columbia Board of Education*, 471 F. Supp. 136 (D.C.D.C. 1979). These administrative procedures have been incorporated into the Rehabilitation Act through its regulations, and petitioner attempts to totally sidestep these procedures as well.

The administrative remedies under both the Rehabilitation Act and the EHA are detailed and extensive. "[C]ompare the elaborate administrative hearing and complaint regulations promulgated under the federal Education for All Handi-

capped Children Act of 1975, * * *, which do provide for administrative review of individual complaints * * *." *Patton v. Dumpson*, 75-4922, (S.D.N.Y., decision filed January 25, 1980). Since there is a meaningful administrative enforcement mechanisim, and even assuming that a private cause of action under Section 504 exists in this case, such action should be limited to a *posteriori* judicial review. *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277, 1286 ftnte. 29 (7th Cir. 1977); *Concerned Parents and Citizens for Continuing Education at Malcolm X (PS79) v. New York City Board of Education*, 629 F. 2d 751 (2d Cir. 1980).

CONCLUSION.

The District Court determined that respondents have been diligent in their efforts to deal with the student's needs. Conversely, petitioners had not only failed to be diligent in pursuing the federal and state procedural safeguards established for such matters, but the first step in those procedures had never even been taken until the complaint had been dismissed by the District Court. Petitioner thereafter began to pursue his administrative remedies as noted by the Circuit Court.

Petitioner's action was brought under several statutes, which included the Rehabilitation Act and the EHA. As the District Court noted, petitioner's claims under the Rehabilitation Act are substantially the same as his claims

under the EHA (B-41). Petitioner should not be permitted to enter the courts at this time simply because he has chosen to use a different label for the same facts, circumstances and relief requested.

Extensive administrative remedies are present which petitioner has now begun to follow regarding this matter. In his petition, he contends that he should not have to pursue and exhaust the administrative remedies which he is now pursuing. To permit petitioner to sidestep completely the procedures established for such matters merely by making conclusory allegations that the Rehabilitation Act was violated would not only be against the intent of Congress and the State in resolving these matters, but would also open a flood-

gate of litigation regarding them. The petition for certiorari should be denied.

Respectfully submitted,

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